BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 83A-0544-PS
DART CONTAINER CORPORATION OF CALIFORNIA	)	
	)	

Appearances:

For Appellant: Benjamin O. Schwendener, Jr.
Attorney at Law

For Respondent: Donald C. McKenzie
Counsel

O P I N I O N

This appeal is made pursuant to section 26075, subdivision (a),[2/] of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claims of Dart Container Corporation of California for refund of franchise tax in the amounts of $50,717.29, $42,908.83, $55,076.64, $60,050.00, and $61,504.00 for the income years ended March 31, 1975, March 31, 1976, March 31, 1977, March 31, 1978, and March 31, 1979, respectively.

[2/] Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the income years in issue.

The questions presented by this appeal are whether the appellant, Dart Container Corporation of California, has shown: 1) that the Franchise Tax Board (FTB) erred in determining that Dart Oil & Gas Co. (Dart Oil [now Dart Energy Corporation]) was not a part of the unitary business conducted by appellant, its parent, and others of its parent's subsidiaries;[3/] 2) that the standard three-factor apportionment formula does not fairly represent the extent of appellant's business activity in California; and 3) that royalties appellant paid to its parent should be deducted from the California numerator of the sales factor.[4/]

During the years in issue, a majority of the voting stock of appellant was owned by Dart Container Corporation (Dart), a Michigan corporation.[5/] In income year 1979, Dart Management Corporation was formed and replaced Dart as the ultimate parent of appellant. Appellant, Dart, and other Dart subsidiaries (hereinafter "manufacturing entities") manufactured and sold food service products such as styrofoam cups, plastic lids for the styrofoam cups, plastic cutlery, and foam dinnerware. Most of the manufacturing equipment used by the manufacturing entities had been engineered, designed, and manufactured by Dart and licensed to appellant and the other manufacturing subsidiaries.

The operations of the manufacturing entities were very energy intensive, with the principal material used being expandable polystyrene bead (EPS), commonly referred to as "bead." The bead was manufactured from petrochemicals, called monomers, impregnated with pentane and butane gases. Molds were filled with bead and subjected to hot dry steam at high pressure to expand the bead into a foam product; boilers fueled by natural gas, fuel oil, or, on occasion, crude oil, generated the steam. The manufacturing entities used millions of pounds of bead each month.

Neither Dart nor any of its manufacturing subsidiaries maintained a sales staff, and all products were sold by a nonaffiliated corporation, Container Sales Corporation (Container Sales). Orders were sent by Container Sales to Dart in Michigan, and approved orders were forwarded to the manufacturing subsidiary nearest the customer. Dart then purchased the product from its subsidiary, resold it to the customer, and the selling subsidiary drop-shipped the product to the customer. Dart paid the subsidiary a percentage of the selling price (appellant received 88 percent, and the other subsidiaries received 76.5 percent), and was liable for all expenses associated with the sale. The amount of the sales price retained by Dart represented a royalty payment for the use of Dart's container technology and reimbursement for all costs connected with the sale.

[3/] The appellant apparently no longer contests FTB's determination that Dart Medical Equipment, Inc., was not part of the unitary business of which appellant was a part.

[4/] The appellant has abandoned its argument that sales commissions should also be deducted from the sales factor numerator.

[5/] The parties discuss the issue of unity in terms of the relationship of Dart, appellant's parent, to Dart Oil. We will also do so and treat appellant as unitary or not with the oil and gas entities depending upon our resolution of the issue with regard to Dart and Dart Oil.

Dart Oil, Universal Drilling Corporation (Universal), and T.D. Provins Drilling Company (Provins) (hereinafter "oil and gas entities") conducted oil and gas exploration and production in locations other than California. Dart Oil was established in 1977 as a wholly owned subsidiary of Dart, Provins was another Dart subsidiary, and Universal was a wholly owned subsidiary of Dart Oil. Appellant states that all decisions of the oil and gas entities regarding land acquisitions, exploration, and drilling were subject to approval by Dart's board of directors, but the actual exploration and drilling were performed by Dart Oil employees. Appellant also states that Dart arranged for or performed all insurance work, financial consulting, and tax and management planning, and, in addition, performed some of the payroll, accounting, personnel, and legal work for Dart Oil.

Appellant filed its California tax returns for the years in issue on a separate accounting basis. On audit, respondent Franchise Tax Board determined that the manufacturing entities were engaged in a single unitary business and that Dart Oil was not part of that unitary business. Appellant protested, disputing, among other things no longer in issue, respondent's failure to include Dart Oil in appellant's combined report. In addition, appellant petitioned for relief under section 25137, asking that the three-factor apportionment formula be revised to recognize the value of the equipment technology previously developed by Dart by either modifying the property factor or adding a fourth factor. Appellant's protest and petition were denied, and this timely appeal followed.

Combination Issue

If a taxpayer derives income from sources both within and without California, its franchise tax liability is required to be measured by its net income derived from or attributable to sources within this state. (Rev. & Tax. Code, § 25101.) If the taxpayer is engaged in a single unitary business with affiliated corporations, the income attributable to California sources must be determined by applying an apportionment formula to the total income derived from the combined unitary operations of the affiliated companies. (Edison California Stores, Inc. v. McColgan, 30 Cal.2d 472 [183 P.2d 16] (1947).)

The California Supreme Court has held that the existence of a unitary business may be established by the presence of unity of ownership; unity of operation as evidenced by central accounting, purchasing, advertising, and management divisions; and unity of use in a centralized executive force and general system of operation. (Butler Bros. v. McColgan, 17 Cal.2d 664 [111 P.2d 334] (1941), affd., 315 U.S. 501 [86 L.Ed. 991] (1942).) It has also stated that a business is unitary if the operation of the business done within California is dependent upon or contributes to the operation of the business outside California. (Edison California Stores, Inc. v. McColgan, supra, 30 Cal.2d at 481.) The United States Supreme Court has emphasized that a unitary business is a functionally integrated enterprise whose parts are characterized by substantial mutual interdependence and a flow of value. (Container Corp. v. Franchise Tax Board, 463 U.S. 159, 178-179 [77 L.Ed.2d 545], reh. den., 464 U.S. 909 [78 L.Ed. 248] (1983).) Most recently, the court reiterated that there are three objective indicia of a unitary business: functional integration, centralization of management, and economies of scale. (Allied Signal, Inc. v. Dir., Div. of Taxation, --- U.S. --- (1992).)

It is axiomatic that business activities conducted in multiple taxing jurisdictions are not

automatically unitary merely because they are commonly owned and controlled. Because of constitutional limitations, it is necessary to differentiate between a truly integrated, unitary business, whose income is appropriately apportioned among the jurisdictions in which it is conducted, and a group of commonly owned businesses or activities, the operations of which really have no effect upon one another and the income from which is, therefore, not properly subject to apportionment. (Appeal of Sierra Production Service, Inc., et al., 90-SBE-010, Sept. 12, 1990, and cases cited therein.)

The parties do not dispute that unity of ownership existed. However, appellant must demonstrate that either the unities of operation and use were also present, or that the contribution or dependency test was satisfied. (Chase Brass & Copper Co. v. Franchise Tax Board, 10 Cal.App.3d 496, 502 [87 Cal.Rptr. 239], app. dism. and cert. den., 400 U.S. 961 [27 L.Ed.2d 381] (1970).)

When considering whether unity of operation is present, we are impressed by the absence of many of the usual indicators. In the instant matter, there were no centralized divisions for purchasing, advertising, accounting, or management, no exchange of employees, no sharing of staff or management functions, no centralized research and development, and no other centralized administrative department divisions. While insurance and employee benefit plans for both Dart and Dart Oil were administered by Dart, there is no evidence in the record of any material cost savings or other significant benefits arising from this. Intercompany financing, which has been held to be indicative of unity of operation, did exist. (Chase Brass & Copper Co. v. Franchise Tax Board, supra, 10 Cal.App.3d at 503.) However, the U.S. Supreme Court has made clear that financing can serve either an investment function or an operational function, but is only indicative of unity when it serves the latter function. (Allied Signal, Inc. v. Dir., Div. of Taxation, supra, --- U.S. at ---; Container Corp. v. Franchise Tax Board, supra, 463 U.S. at 180, fn. 19.) Here, the large loans made by Dart to Dart Oil, which were later converted to equity investments, appear to have served only an investment function, since, as we explain later, Dart Oil was not operationally related to Dart's unitary cup manufacturing business. Thus, in the absence of any of the usual significant indicators, we must conclude that unity of operation between Dart and Dart Oil was lacking during the relevant years. Having concluded that unity of operation was not present, we need not address whether unity of use was present, because in the absence of one of the three unities a business cannot be considered unitary under the three unities test. (Chase Brass & Copper Co. v. Franchise Tax Board, supra, 10 Cal.App.3d at 502.)

We now address whether there was contribution or dependency sufficient to satisfy the test established in Edison California Stores, Inc. In income year 1977, one member of Dart Oil's seven-member board was also a Dart board member, but there were no officers common to both entities. In income years 1978 and 1979, there were two or three common officers, and four members of Dart's board were also members of Dart Oil's board. While an "integrated executive force" has been given considerable weight in concluding that mutual contribution or dependency was present (Chase Brass & Copper Co. v. Franchise Tax Board, supra, 10 Cal.App.3d at 504), we know of no case where the existence of contribution or dependency was found solely from the presence of common officers and directors alone. This board has found mutual contribution or dependency to exist in appeals where there was substantial interdivisional or intercorporate product flow and an integrated executive force (Appeal of Beecham, Inc., Cal. St. Bd. of Equal., Mar. 2, 1977; Appeal of Grolier Society, Inc., Cal.

St. Bd. of Equal., Aug. 19, 1975), and where there was substantial vertical integration, an integrated executive force, and other indications of a unitary relationship. (Appeal of Nippondenso of Los Angeles, Inc., Cal. St. Bd. of Equal., Sept. 12, 1984.) These factual situations are not present here.

Here, Dart and the manufacturing subsidiaries were engaged in the manufacture and sale of food service products, while Dart Oil was engaged in oil and gas exploration. Dart's management did not possess any expertise in the exploration for, or production of, oil or gas. Therefore, there is no basis for assuming that a mutually beneficial exchange of know-how or operating information occurred. (Cf. Appeals of Allstate Enterprises, Inc., et al., Cal. St. Bd. of Equal., Nov. 14, 1984, and cases cited therein.) There likewise was no product flow, centralized advertising, centralized purchasing, or intercompany sales. Consequently, we do not believe that substantial mutual interdependence and a flow of value were present between Dart and Dart Oil. (See Container Corp. v. Franchise Tax Board, supra; see also Appeal of Sierra Production Service, Inc., et al., supra.)

Appellant contends that Mole-Richardson Company v. Franchise Tax Board, 220 Cal.App.3d 889 [269 Cal.Rptr. 662] (1990), is binding precedent and determinative of the issue of unity in this case. (App. Supp. Br., July 17, 1990, at 7.) The Mole-Richardson court applied the standards of regulation 25120, subdivision (b)(3), upon which appellant also relies, and found that a unitary business existed in that case. (Cal. Code Regs., tit. 18, reg. 25120, subd. (b)(3).) The court stated that it believed that the determinative factors in finding "functional integration" are "strong centralized management, coupled with the existence of centralized departments for such functions as financing, advertising, research, or purchasing," along with the existence of the three unities as described in Butler Bros. (Mole-Richardson Company v. Franchise Tax Board, supra, 220 Cal.App.3d at 899.) In Mole-Richardson, the court found the existence of a unitary business from the facts that all major business decisions for the unitary group were made by a single individual; all accounting, payroll, insurance, and other administrative and management functions were performed in California for all the in-state and out-of-state activities; and economies of scale and intercompany financing existed.

Here, the record indicates that the most significant managerial role played by Dart's management with respect to Dart Oil was to review its expenditures. At best, Dart's management activities indicate nothing more than financial oversight of a subsidiary by its parent company. Clearly, the finding that a unitary business exists cannot be based merely on this type of relationship. (F. W. Woolworth v. Taxation & Revenue Dept., 458 U.S. 354, 369 [73 L.Ed.2d 819] (1982).) A finding of "centralized management" within the meaning of regulation 25120, subdivision (b)(3), requires more than the mere existence of "common officers or directors." The regulation clearly contemplates that the central managers will, among other things, play a regular operational role in the business activities of the various divisions or affiliates. (See Appeal of Sierra Production Service, Inc., et al., supra, fn. 5, citing Container Corp. v. Franchise Tax Board, supra, 463 U.S. at 180, fn. 19; see also Mole-Richardson Company v. Franchise Tax Board, supra.) Dart's management did not do this for Dart Oil.

With respect to the "centralized departments" contemplated by regulation 25120, subdivision (b)(3), and Mole-Richardson, we said in Sierra Production Service, et al., that proof of a "centralized department" requires something weightier than merely alleging, for example, that there was a

"common accountant" who kept the books for each affiliate. Other trivialities like a "common insurance agent" will likewise be insufficient. (Appeal of Sierra Production Service, Inc., et al., supra, fn. 6.) The evidence in this case shows little of substance. Aside from indications that insurance and employee benefit plans were centrally administered by Dart, the most the evidence suggests is that, for a fee, Dart from time to time granted Dart Oil the use of Dart's mainframe computer and some of its personnel to assist Dart Oil's own staff in performing such functions as payroll processing and the preparation of financial statements. Such periodic assistance by a parent to a subsidiary certainly does not rise to the level of "centralized departments." Far more than this was present in Mole-Richardson.

For the above reasons, we conclude that Dart and Dart Oil shared neither centralized management nor centralized departments as contemplated by either regulation 25120, subdivision (b)(3), or the court's decision in Mole-Richardson.

As another ground for the unity of Dart and Dart Oil, appellant argues that the energy-intensive nature of its foam container business and its experience with shortages of oil and oil-based materials during the early 1970's led it to form Dart Oil so that it would have an assured source of petroleum products should a shortage occur again. In its briefs, appellant argues, essentially, that Dart Oil was formed as a business necessity, similar to insurance. Appellant states that Dart's purpose was to ensure a supply of oil that could either have been made into bead or traded for bead. Appellant equates Dart's acquisition of Dart Oil with the purchase of business interruption insurance and concludes that, if the latter is tax deductible as a business expense, Dart Oil's activities should be regarded as an integral part of the food service manufacturing business. Appellant also alleges that a primary benefit of the establishment of Dart Oil was enhanced customer relations, purportedly because the customers believed that Dart would be able to continue production of its foam products even if another oil shortage should occur. Finally, appellant states that it was beneficial for the manufacturing business to have oil production so that it could make its own oil-based materials.

However, no oil from Dart Oil was used by Dart, appellant, or any of the other members of the manufacturing group during the appeal years. Although Dart apparently explored the possibilities of exchanging oil for materials, it never actually entered into a contract with a manufacturer of bead and there is no evidence to show that enough oil could have been produced and exchanged to supply any significant portion of the needs of the manufacturing entities during a shortage. On these facts, even if we were to accept the legal premise behind appellant's "insurance" analogy, we must reject the argument for the same reasons we rejected a virtually identical argument in Appeal of Yellow Freight System, Inc., 92-SBE-016, decided by this board on June 18, 1992: Dart and its manufacturing subsidiaries didn't actually obtain any "insurance."

With regard to the allegation of enhancement of customer relations, no independent evidence of this "benefit" has been presented. Although Dart eventually did begin making its own bead, this did not occur until after the appeal years, and no evidence has been presented that oil from Dart Oil was either available, necessary, or used in this operation. We do not see any flow of value from Dart Oil to Dart, and the only discernible flow of value from Dart to Dart Oil was a financial one. That, of course, cannot support a finding of unity where, as here, the financing served no operational purpose.

(Allied-Signal, Inc. v. Dir., Div. of Taxation, supra, --- U.S. at ---.)

While production by Dart Oil might have proven to be of benefit to the manufacturing entities, the reality is that, during the years in issue, Dart Oil neither discovered any oil or gas nor sold any to the manufacturing entities. Dart's hope that Dart Oil would discover oil or gas cannot be the basis for a unitary relationship between them. A parent corporation's intent or purpose to engage in a unitary business with an acquired corporation or an existing affiliate is clearly not sufficient to support a finding that they are actually engaged in the same unitary business. (See Allied-Signal, Inc. v. Dir., Div. of Taxation, supra, --- U.S. at ---; Appeals of Gasco Gasoline, Inc., et al., 88-SBE-017, June 1, 1988.)

Thus, we conclude that, during the years in question, Dart and the other manufacturing entities, including appellant, were not engaged in a single unitary business with Dart Oil and the other oil and gas entities.

Section 25137 Issue

Taxpayers engaged in a unitary business must allocate and apportion their net income in accordance with the provisions of sections 25120 through 25141. (Rev. & Tax. Code, § 25101.) In general, a taxpayer's unitary business income must be apportioned by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three. (Rev. & Tax. Code, § 25128.) The standard allocation and apportionment provisions may, however, occasionally produce inequitable results when applied to unusual factual situations, and in such cases discretionary adjustments to the standard procedures may be made as provided in section 25137. However, the special allocation and apportionment methods authorized by section 25137 may not be employed unless the party invoking that section first proves that the standard provisions do not fairly represent the extent of the taxpayer's business activity in California. (See Communications Satellite Corp. v. Franchise Tax Board, 156 Cal.App.3d 726, 737 [203 Cal.Rptr. 779] (1984); Appeal of Merrill, Lynch, Pierce, Fenner & Smith, Inc., 89-SBE-017, June 2, 1989.)

In order to demonstrate that California's apportionment formula does not fairly represent its activities in the state, appellant has produced exhibits which purport to demonstrate that, had appellant received the same percentage of sales receipts as did its non-California manufacturing affiliates, the non-California companies would still be significantly more profitable than appellant. Based on these exhibits, appellant concludes that the standard three-factor formula has the effect of "importing" profits generated by the non-California companies into California, and, therefore, modification of the three-factor formula is necessary to ameliorate this unfair effect. This argument appears to be similar to the argument made to and rejected by the U.S. Supreme Court in Container.

In Container the taxpayer argued that its foreign subsidiaries were significantly more profitable than it was and that the three-factor formula, by ignoring that fact and relying instead on indirect measures of income such as payroll, property, and sales, systematically distorted the true

apportionment of income between Container and the foreign subsidiaries. In rejecting this argument, the court stated: "[T]he problem with this argument is obvious: the profit figures relied on by appellant are based on precisely the sort of formal geographical accounting whose basic theoretical weaknesses justify resort to formula apportionment in the first place." (Container Corp. v. Franchise Tax Board, supra, 463 U.S. at 181.) The Container court also recognized that "geographical accounting and formula apportionment are imperfect proxies for an ideal which is not only difficult to achieve but also difficult to describe in theory." (Container Corp. v. Franchise Tax Board, supra, 463 U.S. at 182.) Obviously, some distortion is inherent in both geographical accounting and formula apportionment, but the method of apportionment will not be disturbed so long as the distortion is "within the substantial margin of error inherent in any method of attributing income among the companies of a unitary business." (Container Corp. v. Franchise Tax Board, supra, 463 U.S. at 184.) Here, appellant's exhibits do not demonstrate that the income allegedly "imported" into California was completely unrelated to appellant's activities in the state, nor do the exhibits demonstrate that use of the standard three-factor formula results in an erroneous attribution of income to California; they merely demonstrate the effect on profit when different percentages of the sales revenues are received.

Appellant also makes an exhaustive comparison of the operations of Dart's unitary manufacturing group (which we shall refer to merely as "Dart" in this discussion) with the operations of WMF Container Corporation (WMF), a nonaffiliated corporation in the same line of business as Dart. Appellant claims that the operations of both businesses were identical, except for the fact that WMF's manufacturing equipment was readily available on the market and Dart's manufacturing equipment was proprietary. Appellant also claims that Dart's pre-tax income was greater than WMF's because of the superior technology associated with Dart's manufacturing equipment. We do not believe that appellant's evidence justifies the use of section 25137. Even if we ignore the fact that WMF's operational information is for a period subsequent to this appeal, there is still no evidence that Dart's proprietary manufacturing equipment was the sole reason for the difference in income; technology is but one of many factors which can contribute to the profitability of a manufacturing entity. Most importantly, however, the comparisons fail to demonstrate how California's three-factor formula unfairly reflects the extent of Dart's business activities in California.

Another argument advanced by appellant is based on the constitutional principle of "external consistency." Appellant alleges that respondent is required to explain how the standard three-factor formula achieved external consistency in the apportionment of Dart's intangible income. (App. Supp. Br., Aug. 5, 1988, at 1, 10, 14.) There are at least two problems with this argument. First, the external consistency principle is a constitutional principle used to determine the fairness of an apportionment formula under both the Due Process and Commerce Clauses of the U.S. Constitution. Therefore, appellant, in effect, seeks to have us declare the standard three-factor formula unconstitutional if respondent cannot explain how the formula achieved external consistency. We have repeatedly held that article III, section 3.5, of the California Constitution precludes us from determining that statutory provisions are unconstitutional. (E.g., Appeal of Capitol Industries-EMI, Inc., 89-SBE-029, Oct. 31, 1989; Appeal of Aimor Corp., Cal. St. Bd. of Equal., Oct. 26, 1983.) Secondly, in Container, the court reminds us that the Constitution does not require the invalidation of an apportionment formula that may tax income earned outside the state, but that the court would

> strike down the application of an apportionment formula if the taxpayer can prove by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State,' [citation], or has 'led to a grossly distorted result,' [citation]." [Emphasis added.]

(Container Corp. v. Franchise Tax Board, supra, 463 U.S. at 170.)

Thus, it is appellant, not respondent, who must establish that the standard three-factor formula does not achieve external consistency.

For the above reasons, we must conclude that appellant has failed to demonstrate that section 25137 must be used.

Sales Factor Issue

Appellant argues that the sales factor numerator should be reduced by the amount, retained by Dart from the selling price of appellant's products, which represents royalties from appellant to Dart for use of the cup-manufacturing technology developed by Dart.[6/] Appellant contends that these amounts retained by Dart represent sales of other than tangible personal property and should be excluded from the numerator of the sales factor pursuant to section 25136. Section 25136 provides that sales of other than tangible personal property are considered to be in this state (i.e., included in the numerator of the sales factor) if a greater proportion of the income-producing activity is performed in this state than in any other state. Appellant appears to argue that, along with the tangible products that it sells, it is selling, as a separate item of intangible personal property, the technology it uses to create its products; that the income-producing activity related to this intangible property was the development of the technology; and that the technology was developed by Dart in Michigan. Therefore, appellant concludes, the amount equal to the royalties cannot be included in the sales factor numerator for California.

We find unpersuasive appellant's attempt to treat the royalty amounts included in the sales price of its products as receipts from a separate sale of intangible property. What actually occurred was that appellant sold tangible personal property for a single price that was computed to include an amount for a royalty payment to Dart. The entire amount of the sales price constituted gross receipts from the sale of tangible personal property. There simply was no separate sale of an intangible item. Therefore, the entire gross receipts from the sale of appellant's products are includable in the numerator of the sales factor.

In view of above, we must sustain respondent's action in this matter.

[6/] See pages 3-4, infra, for a description of how the products of appellant were sold and paid for.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claims of Dart Container Corporation of California for refund of franchise tax in the amounts of $50,717.29, $42,908.83, $55,076.64, $60,050.00, and $61,504.00 for the income years ended March 31, 1975, March 31, 1976, March 31, 1977, March 31, 1978, and March 31, 1979, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of July, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, and Ms. Scott present.

_____, Chairman

Ernest J. Dronenburg, Jr., Member

Windie Scott*, Member

_____, Member

_____, Member

*For Gray Davis, per Government Code section 7.9

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